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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JASON NICHOLS et al., Plaintiffs, Cross-defendants and Appellants, v. JAMES HOWARD et al., Defendants, Cross-complainants and Appellants.	G038754 (Super. Ct. No. 06CC03902) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed in part, reversed in part and remanded with directions. Motion to dismiss cross-appeal. Denied.

David B. Dimitruk for Plaintiffs, Cross-defendants and Appellants.

Law Offices of D. Scott Abernethy, D. Scott Abernethy; Law Offices of Andrew D. Weiss and Andrew D. Weiss for Defendants, Cross-complainants and Appellants.

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INTRODUCTION

Buyers Jason Nichols and Jeffrey Miller appeal from a judgment after a bench trial awarding equitable relief and damages to sellers James Howard and Susan Howard (the Howards), in connection with a purchase agreement for a house. The equitable remedy available to the Howards under the Home Equity Sales Contract Act (HESCA) (Civ. Code, § 1695 et seq.), given the circumstances of this case, is rescission, not cancellation. (All further statutory references are to the Civil Code unless otherwise specified.) The purchase agreement could not be rescinded because the Howards failed to offer evidence of their ability to repurchase the property. In addition, the trial court erred in its calculation of damages; therefore, we reverse the judgment and remand for recalculation of damages, if any, and issuance of a new statement of decision and a new judgment.

The Howards cross-appeal, arguing the trial court erred in rejecting their claim of fraud against Nichols and Miller. Substantial evidence supported the trial court's judgment on the fraud claim, so we affirm that portion of the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Howards purchased a home in Rancho Santa Margarita (the property) in 2002. The Howards fell behind in their mortgage payments, and a notice of default was recorded against the property in September 2003. The Howards filed a bankruptcy petition on January 8, 2004.

The Howards responded to a flyer received in the mail from Nichols and Miller. Miller sent the Howards a letter dated January 20, 2004, reading in relevant part: "You will be given enough cash to pay off all your bills, fix your car, clear yourself from your second attempt at Bankruptcy, and allow yourself to save money over the next 12 months by not making any mortgage payment or rent payment."

On January 29, 2004, the parties entered into a written agreement by which Nichols and Miller would purchase the property for $378,000, which at that time was appraised at $415,000. The purchase contract was amended twice; the purchase price was increased to $400,000, and Miller was removed from the purchase contract as a buyer of the property.[1] The purchase contract documents did not contain the cancellation and notice provisions required by sections 1695.3, 1695.4, and 1695.5; neither Nichols nor Miller knew such provisions were required.

The parties also signed a residential-lease-after-sale agreement, by the terms of which the Howards would lease the property from Nichols and Miller for one year for $1 per month. At that time, the fair market rental value of the property was between $2,100 and $2,250 per month. The parties also entered into an option agreement, permitting the Howards to repurchase the property during a one-year period for "no less th[a]n current appraised value, and no more th[a]n market price at time option is exercised." The Howards never exercised the option.

Escrow closed on February 26, 2004, and title was transferred to Nichols. The bankruptcy petition, which had been filed by the Howards to avoid foreclosure, was dismissed. Miller and Christopher Kelley were later added as joint tenants to title. Miller and Kelley deeded their interest in the property back to Nichols, and, in December 2004, Nichols refinanced the property for a new loan of $486,000. As of September 14, 2004, the property was appraised at $540,000.

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[1] Although Miller was removed from the purchase agreement, and Nichols alone took title to the property, they agreed they were both equitable owners of the property. At trial, Nichols and Miller's counsel explained, "Mr. Nichols and Mr. Miller . . . treat each other, and have agreed between the two of themselves to be co-owners of this property; and, so, whatever is good for the goose is good for the gander in this case." Counsel also agreed Miller was obligated under the contract to the same extent as Nichols.

Nichols and Miller demanded that the Howards begin paying rent in February 2005. The Howards paid $2,000 per month in rent from March through May 2005. On June 3, 2005, the Howards' attorney sent a letter to Nichols and Miller, attempting to cancel the transaction. The Howards did not pay rent after May 2005. Nichols and Miller continued to make the mortgage payments, and to pay the homeowners association dues, property taxes, and insurance premiums for the property.

In March 2006, Nichols and Miller filed a lawsuit to quiet title, and for partition, declaratory relief, breach of contract, and ejectment. On July 21, the Howards filed a first amended cross-complaint to quiet title and for reformation, rescission, and cancellation.

Immediately before the bench trial, the Howards filed a motion in limine, which was actually a motion for leave to file a second amended cross-complaint.[2] The trial court stated its "inclination" to permit the cross-complaint to be amended to conform to proof, based in part on the Howards' counsel's statement that "the matter will just be washed out in trial briefs and then post-trial motions to conform," and took the motion under submission. The trial court never ruled on the motion on the record, and the Howards did not make any posttrial motions to amend or conform. However, the court's statement of decision provided findings on issues that were raised only in the proposed second amended cross-complaint, and the parties filed posttrial briefs on an issue that could only be considered by the court if it had permitted the filing of the second amended cross-complaint.[3]

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[2] On our own motion, we augment the record on appeal with the proposed verified second amended cross-complaint, which was attached as exhibit 2 to the Howards' motion in limine No. 5 to amend the cross-complaint, filed September 18, 2006, in *Nichols v. Howard* (Super. Ct. Orange County, 2006, No. 06CC03902). (Cal. Rules of Court, rule 8.155(a)(1)(A).)

[3] The issue, which was raised in a minute order dated November 3, 2006, is the following: "Whether the law allows separate recovery of damages for violations of both Civil Code [section] 1695 et seq[.] and Civil Code [section] 2945 et seq."

On February 9, 2007, the trial court issued a minute order, which Nichols and Miller describe as a tentative decision and the Howards describe as a statement of decision. The detailed judgment, filed in April 2007, ordered: (1) the Howards to pay Nichols and Miller the sum of $147,709.52; (2) Nichols and Miller to apply said amount plus interest to reduce the debt on the property; (3) upon such reduction of debt, the Howards shall have 30 days to refinance the property or otherwise remove Nichols and Miller from the debt and security therefor; (4) when such removal occurs, title to the property shall be quieted in favor of the Howards and transfer of title shall occur concurrently therewith; (5) if the Howards do not so remove Nichols and Miller, the property shall immediately be listed for sale at a fair market price to effect such removal and the property shall be sold on reasonable terms; (6) the net proceeds shall be allocated to first remove Nichols and Miller from the debt and security, and any balance paid to the Howards; (7) as of the date of conclusion of the trial (September 22, 2006), the Howards shall be responsible for maintaining the note, dues and taxes and any such payments made by Nichols and Miller since that date prior to their removal from the debt shall be a setoff against the amount of the judgment and credited to them; and (8) the Howards to recover costs and attorney fees.

Nichols and Miller filed a motion for a new trial and a motion to vacate the judgment. The trial court denied both motions. Nichols and Miller filed a notice of appeal, and the Howards filed a notice of cross-appeal.

DISCUSSION

I.

HESCA AND MORTGAGE FORECLOSURE CONSULTANTS ACT

A. *HESCA*

HESCA (§ 1695 et seq.) is a consumer protection act enacted in 1979, which was intended to provide certain safeguards to homeowners whose property is acquired by an equity purchaser while the property is in foreclosure. The Legislature explicitly set forth its intent in enacting HESCA: "(a) The Legislature finds and declares that homeowners whose residences are in foreclosure have been subjected to fraud, deception, and unfair dealing by home equity purchasers. The recent rapid escalation of home values, particularly in the urban areas, has resulted in a significant increase in home equities which are usually the greatest financial asset held by the homeowners of this state. During the time period between the commencement of foreclosure proceedings and the scheduled foreclosure sale date, homeowners in financial distress, especially the poor, elderly, and financially unsophisticated, are vulnerable to the importunities of equity purchasers who induce homeowners to sell their homes for a small fraction of their fair market values through the use of schemes which often involve oral and written misrepresentations, deceit, intimidation, and other unreasonable commercial practices. [¶] (b) The Legislature declares that it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership. [¶] (c) The Legislature further finds that equity purchasers have a significant impact upon the economy and well-being of this state and its local communities, and therefore the provisions of this chapter are necessary to promote the public welfare. [¶] (d) The intent and purposes of this chapter are the following: [¶] (1) To provide each homeowner with information necessary to make an informed and intelligent decision regarding the sale of his or her home to an equity purchaser; to require that the sales agreement be expressed in writing; to safeguard the public against deceit and financial hardship; to insure, foster, and encourage fair dealing in the sale and purchase of homes in foreclosure; to prohibit representations that tend to mislead; to prohibit or restrict unfair contract terms; to afford homeowners a reasonable and meaningful opportunity to rescind sales to equity purchasers; and to preserve and protect home equities for the homeowners of this state. [¶] (2) This chapter shall be liberally construed to effectuate this intent and to achieve these purposes." (§ 1695.)

For purposes of HESCA, an equity purchaser is anyone who acquires title to a residence in foreclosure, subject to certain exceptions not relevant here. (§ 1695.1, subd. (a).) A residence in foreclosure or residential real property in foreclosure is a one- to four-unit dwelling, which the existing owner occupies as his or her primary residence, and against which there is a notice of default. (§ 1695.1, subd. (b).) An equity seller is the person selling a residence in foreclosure. (§ 1695.1, subd. (c).)

HESCA requires a contract to purchase a property in foreclosure to meet certain requirements in terms of content and form. (§§ 1695.2, 1695.3, 1695.4, 1695.5.) Of particular relevance in this case, the contract must include two notices of cancellation: first, notice in "immediate proximity" to the seller's signature line on the purchase agreement of the right to cancel with the date and time "on which the rescission right ends," as well as a reference to a separate notice (§ 1695.5, subd. (a)); and, second, on a separate page, a notice to the equity seller that he or she may cancel the contract until midnight on the fifth business day after the contract is signed, or until 8:00 a.m. on the day the sale is to occur, whichever comes first (§§ 1695.4, subd. (a), 1695.5, subd. (b)). Until the equity purchaser provides the notice to the equity seller in the proper form, "the equity seller may cancel the contract." (§ 1695.5, subd. (d).)[4]

Until the cancellation period ends, the equity purchaser may not accept a transfer of the equity seller's interest in the property (§ 1695.6, subd. (b)(1)); record with the county recorder any document conveying the property, signed by the equity seller (§ 1695.6, subd. (b)(2)); transfer or encumber the property (§ 1695.6, subd. (b)(3)); or pay any consideration to the equity seller (§ 1695.6, subd. (b)(4)).

[4] Subdivision (d) was added to section 1695.5 as a legislative response to the appellate court's decision in *Boquilon v. Beckwith* (1996) 49 Cal.App.4th 1697, which will be discussed in detail, *post*.

Additionally, if the equity seller has been given an option to repurchase the property, the equity purchaser may not encumber the property without the written consent of the equity seller. (§ 1695.6, subd. (e).)

HESCA prohibits any person from "initiat[ing], enter[ing] into, negotiat[ing], or consummat[ing] any transaction involving residential real property in foreclosure . . . if such person, by the terms of such transaction, takes unconscionable advantage of the property owner in foreclosure." (§ 1695.13.) If a transaction violates section 1695.13, the equity seller may rescind the transaction within two years after the date the property conveyance is recorded. (§ 1695.14, subd. (a).) The equity seller may also bring an action for damages and/or equitable relief against the equity purchaser within four years after any violation of section 1695.6 or 1695.13. (§ 1695.7.) Exemplary damages or a civil penalty may also be awarded. (*Ibid.*)

B. *Mortgage Foreclosure Consultants Act (FCA)*

The Mortgage Foreclosure Consultants Act (FCA) (§ 2945 et seq.), also enacted in 1979, is another consumer protection act very similar in purpose to HESCA. It, too, contains a detailed and explicit statement of the legislative intent behind it:

"(a) The Legislature finds and declares that homeowners whose residences are in foreclosure are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants from the time a Notice of Default is recorded pursuant to Section 2924 until the time surplus funds from any foreclosure sale are distributed to the homeowner or his or her successor. Foreclosure consultants represent that they can assist homeowners who have defaulted on obligations secured by their residences. These foreclosure consultants, however, often charge high fees, the payment of which is often secured by a deed of trust on the residence to be saved, and perform no service or essentially a worthless service. Homeowners, relying on the foreclosure consultants' promises of help, take no other action, are diverted from lawful businesses which could render beneficial services, and often lose their homes, sometimes to the foreclosure consultants who purchase homes at a fraction of their value before the sale. Vulnerable homeowners are increasingly relying on the services of foreclosure consultants who advise the homeowner that the foreclosure consultant can obtain the remaining funds from the foreclosure sale if the homeowner executes an assignment of the surplus, a deed, or a power of attorney in favor of the foreclosure consultant. This results in the homeowner paying an exorbitant fee for a service when the homeowner could have obtained the remaining funds from the trustee's sale from the trustee directly for minimal cost if the homeowner had consulted legal counsel or had sufficient time to receive notices from the trustee pursuant to Section 2924j regarding how and where to make a claim for excess proceeds. [¶] (b) The Legislature further finds and declares that foreclosure consultants have a significant impact on the economy of this state and on the welfare of its citizens. [¶] (c) The intent and purposes of this article are the following: [¶] (1) To require that foreclosure consultant service agreements be expressed in writing; to safeguard the public against deceit and financial hardship; to permit rescission of foreclosure consultation contracts; to prohibit representations that tend to mislead; and to encourage fair dealing in the rendition of foreclosure services. [¶] (2) The provisions of this article shall be liberally construed to effectuate this intent and to achieve these purposes." (§ 2945.)

Like HESCA, FCA sets requirements for the form and substance of contracts between consultants and property owners for the provision of certain services. (§§ 2945.2, 2945.3.) The services to which FCA applies are: "(1) Debt, budget, or financial counseling of any type. [¶] (2) Receiving money for the purpose of distributing it to creditors in payment or partial payment of any obligation secured by a lien on a residence in foreclosure. [¶] (3) Contacting creditors on behalf of an owner of a residence in foreclosure. [¶] (4) Arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure his or her default and reinstate his or her obligation pursuant to Section 2924c. [¶] (5) Arranging or attempting to arrange for any delay or postponement of the time of sale of the residence in foreclosure. [¶] (6) Advising the filing of any document or assisting in any manner in the preparation of any document for filing with any bankruptcy court. [¶] (7) Giving any advice, explanation or instruction to an owner of a residence in foreclosure which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure pursuant to a power of sale contained in any deed of trust. [¶] (8) Arranging or attempting to arrange for the payment by the beneficiary, mortgagee, trustee under a power of sale, or counsel for the beneficiary, mortgagee, or trustee, of the remaining proceeds to which the owner is entitled from a foreclosure sale of the owner's residence in foreclosure. Arranging or attempting to arrange for the payment shall include any arrangement where the owner transfers or assigns the right to the remaining proceeds of a foreclosure sale to the foreclosure consultant or any person designated by the foreclosure consultant, whether that transfer is effected by agreement, assignment, deed, power of attorney, or assignment of claim." (§ 2945.1, subd. (e).)

A foreclosure consultant violates FCA by (1) charging for or receiving payment before all contracted-for services have been fully performed; (2) charging more than 10 percent of the amount of any loan made by the consultant to the property owner; (3) securing payment of the consultant's compensation by a wage assignment, lien, or other security; (4) receiving consideration from a third party in connection with services provided to the property owner without fully disclosing that consideration to the property owner; (5) acquiring "any interest in a residence in foreclosure from an owner with whom the foreclosure consultant has contracted"; (6) obtaining a power of attorney from a property owner; (7) inducing a property owner to enter a foreclosure consultant contract that does not comply with the other provisions of FCA; and (8) agreeing to assist the property owner in arranging for an early release of funds from a trustee's sale.

(§ 2945.4.) A property owner aggrieved by a violation of FCA may sue within four years of the violation for actual damages, equitable relief, and exemplary damages. (§ 2945.6.)

II.

STATEMENT OF DECISION

Nichols and Miller initially argue the judgment must be reversed due to the trial court's failure to issue a statement of decision as requested. We hold the trial court's February 9, 2007 minute order constitutes a statement of decision. The order addresses each of the controverted issues submitted to the trial court by the parties, and explains the factual and legal basis for the court's rulings. Code of Civil Procedure section 632 does not require any more than that: "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial."

Here, the Howards requested a statement of decision, and Nichols and Miller submitted what they labeled a proposed statement of decision. (The document was actually a legal brief.) The trial court then issued its order, which addressed each and every issue specified in the parties' joint statement of controverted issues filed before trial. Unlike the trial courts in the cases cited by Nichols and Miller, the trial court here explained the factual and legal basis for its decision, provided the parties with the opportunity to make proposals and objections to the statement of decision, and ensured that the case would be ready for appellate review. (See *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129; *Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 681.)

III.

FAILURE TO RECORD NOTICE UNDER SECTION 1695.14, SUBDIVISION (B)

Nichols and Miller argue the trial court erred in its order because the Howards failed to record a notice of rescission with the county recorder's office. (§ 1695.14, subd. (b).)

Under section 1695.14, subdivision (b), "rescission shall be effected by giving written notice as provided in Section 1691 to the equity purchaser . . . *and by recording such notice with the county recorder* of the county in which the property is located, within two years of the date of the recordation of the conveyance to the equity purchaser." (Italics added.) The Howards do not dispute that they did not record a notice of rescission with the county recorder.

The application of section 1695.14, however, is limited by the following: "In any transaction involving residential real property in foreclosure, as defined in Section 1695.1, *which is in violation of Section 1695.13* is voidable and the transaction may be rescinded by the property owner within two years of the date of the recordation of the conveyance of the residential real property in foreclosure." (§ 1695.14, subd. (a), italics added.) The trial court in this case did not find a violation of section 1695.13. In fact, the trial court's findings are inconsistent with such a finding. The court did not "find misrepresentations made by plaintiffs, only a failure to follow the law." (Italics omitted.) Additionally, the court found Nichols and Miller acted with "altruism" in purchasing the property, despite the fact "they failed to follow the law."

Section 1695.14 itself provides that "[t]he remedies provided by this section shall be in addition to any other remedies provided by law." (§ 1695.14, subd. (e); see also § 1695.4, subd. (a) ["In addition to any other right of rescission, the equity seller has the right to cancel any contract with an equity purchaser"]; § 1695.7 ["An equity seller may bring an action for the recovery of damages or other equitable relief against an equity purchaser"]; § 1695.9 ["The provisions of this chapter are not exclusive and are in addition to any other requirements, rights, remedies, and penalties provided by law"].) Therefore, the Howards' failure to record a notice of rescission is not dispositive.

IV.

FAILURE TO PROVE FINANCIAL ABILITY TO REPURCHASE THE PROPERTY AFTER RESCISSION

Nichols and Miller also argue the trial court erred in granting relief because the Howards failed to prove they had the financial ability to repurchase the property. Section 1691 reads in relevant part: "[T]o effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind: [¶] (a) Give notice of rescission to the party as to whom he rescinds; and [¶] (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so."

The Howards argue that the remedy provided by section 1695.5, and which they sought, was cancellation, not rescission. Because they were not seeking to rescind the purchase agreement, the Howards argue they were not required to establish their ability to repurchase the property. The Howards do not dispute Nichols and Miller's contention that they failed to adduce any evidence at trial of their ability to repurchase the property.

Cancellation and rescission are distinct contractual remedies. "Cancellation abrogates so much of the contract as remains unperformed; future obligations are terminated, but all prior accrued rights remain and are enforceable. [Citation.] Rescission not only terminates further liability but restores the parties to their former position by requiring each to return whatever he or she received as consideration under the contract, or, where specific restoration cannot be had, its value. [Citations.]" (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 926, p. 1023.)

HESCA uses the terms "cancellation" and "rescission" seemingly interchangeably. The Howards argue they sought relief under section 1695.5, which creates the right of cancellation, rather than under section 1691, the general rescission statute which is not a part of HESCA. It is not so simple as that, however. Indeed, section 1695.5, on which the Howards rely, uses the term "rescission" in the same sentence as it creates the right of cancellation. "The contract shall contain in immediate proximity to the space reserved for the equity seller's signature a conspicuous statement in a size equal to at least 12-point bold type, if the contract is printed or in capital letters if the contract is typed, as follows: [¶] '[notice of right to cancel].' The equity purchaser shall accurately enter the date and time of day on which the *rescission right* ends." (§ 1695.5, subd. (a), italics added.) Additionally, section 1695.4, subdivision (a) creates the right of cancellation "[i]n addition to any other right of rescission." HESCA cannot be read to include an absolute, indefinite right to cancel the contract when the equity purchaser fails to provide the required notice of cancellation; indeed, section 1695.6, subdivision (b)(3) makes clear that the equity seller cannot undo a deal with a bona fide purchaser or encumbrancer for value who did not have knowledge of a violation of HESCA.

Based on a reading of these sections, we hold that under HESCA rescission is the general remedy, and cancellation is the additional, specific remedy available under certain circumstances.

Given the factual context of this case, the Legislature must have intended the remedy of rescission rather than cancellation to apply here. The right of cancellation is intended to apply for a limited period of time; the legislative findings emphasize the crucial period "between the commencement of foreclosure proceedings and the scheduled foreclosure sale date." (§ 1695, subd. (a).) Although HESCA provides that the right of cancellation continues until notice of cancellation is given, there is nothing in the statutory scheme demonstrating the Legislature intended the right to cancel the purchase contract to continue indefinitely without requiring the parties to return to the status quo ante.

No reported case in California has addressed this issue; a bankruptcy court, however, considered a similar factual scenario. In *In re Lloyd* (Bankr. N.D.Cal. 2007) 369 B.R. 549, 552, 557-558, the equity purchaser failed to include the notice of cancellation required under section 1695.5, subdivision (a), although the separate page notice of cancellation required by subdivision (b) was included and signed. The bankruptcy court concluded actual compliance, not merely substantial compliance, with section 1695.5, subdivision (a) is required by HESCA. (*In re Lloyd, supra,* 369 B.R. at p. 560.) The bankruptcy court therefore concluded the equity seller's time to cancel the purchase agreement never expired. (*Id.* at pp. 551-552.)

The bankruptcy court then faced the issue of how to undo the deal. The court noted that the Legislature's intent was to provide the equity seller with a quick and easy way out of a purchase agreement. "To make the right to cancel more effective, the equity purchaser may not pay any consideration, accept a deed, record a deed, or transfer or encumber the property until the right to cancel has expired. [Citation.] Thus, the Legislature contemplated that the equity seller would not have to return any consideration, or undo any other aspect of the contemplated sale, as a condition of cancelling the sale contract. The statute also states that the seller's right to cancel is '[i]n addition to any other right of rescission . . . .' [Citation.]" (*In re Lloyd*, *supra,* 369 B.R. at p. 557.)

In *In re Lloyd*, as in the present case, because the equity purchaser completed the sale, and then refinanced the property without providing notice of cancellation to the equity seller, the Legislature's intended simpler remedy was unavailable. As explained by the bankruptcy court: "The Legislature designed the equity seller's right to cancel not to require the unwinding of a completed transfer, by expressly prohibiting the equity purchaser from accepting consideration, receiving a deed, or encumbering the property before the right to cancel has expired. [Citation.] Cancellation is more complex here, solely because [the equity purchaser] did not take care to ensure that the right to cancel had expired before he completed the purchase. This is a case where [the equity purchaser] and [the equity seller] cannot both be restored to the *status quo ante*, because some of the reimbursements [the equity purchaser] seeks are for transaction[] costs that do not represent value provided to [the equity seller], and because those transaction costs were simply lost when the sale was cancelled. In such circumstances, it is [the equity purchaser] who should bear the loss. By violating section 1695[, subdivision](b), [the equity purchaser] created the circumstances that prevent both parties from being restored to the *status quo ante.* [Citation.]" (*In re Lloyd, supra,* 369 B.R. at p. 563.)

The court in *In re Lloyd* cancelled the sale of the property, and quieted title to the property in the equity seller. (*In re Lloyd, supra,* 369 B.R. at p. 564.) The equity seller took title to the property subject to the mortgages placed on the property by the equity purchaser. (*Id.* at p. 563.) The equity purchaser was the sole member of the limited liability company which held the first deed of trust, and controlled the company that held the second deed of trust. (*Id.* at pp. 552-553.) Although the court called the remedy it was imposing "cancellation," by requiring the equity seller to take back the property subject to the mortgages placed on the property by the equity purchaser, the court was actually imposing a rescission remedy.[5]

[5] The United States District Court affirmed the bankruptcy court's opinion in an unpublished decision. (*Hoffman v. Lloyd* (Feb. 1, 2008, C 06-2416 MHP).) In its opinion, the district court, too, used the terms "cancel" and "rescind" interchangeably when referring to the equity seller's rights under HESCA if the equity purchaser has failed to provide notice of cancellation. (See, e.g., *Hoffman v. Lloyd, supra,* C 06-2416 MHP ["[t]he HESCA statute is clear on its face – the sale contract 'shall' contain two separate notices of the *right to cancel* . . . . [Citation.] [¶] In sum, the court holds that

The Howards do not dispute that they were unable to obtain the financing to reacquire the property from Nichols and Miller. The Howards received a loan approval in spring 2005, but, because that approval had been based on a partial submission, the lender refused to make the loan to the Howards. The Howards obtained a second loan approval in October 2005, but they could not accept the loan because they would be unable to make the monthly mortgage payments, given the high interest rate. Because the Howards did not prove their ability to repurchase the property, the remedy of rescission was unavailable to them. However, the Howards were still entitled to seek recovery of any damages they incurred (§ 1695.7 [for violation of section 1695.6, equity seller may recover actual damages, and the court may also award equitable relief]; see generally § 1692 [claims for damages and for rescission are not inconsistent]); calculation of damages will be discussed, *post*.

V.

JUDICIAL ESTOPPEL

Nichols and Miller argue the Howards are judicially estopped from recovering damages because they took inconsistent judicial positions in the bankruptcy court and in the trial court. Specifically, Nichols and Miller argue the Howards used the enforceability of the parties' agreement to induce the bankruptcy court to dismiss the Howards' bankruptcy petition, which had been filed to forestall the foreclosure sale. Therefore, Nichols and Miller argue, the Howards should have been judicially estopped

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where an equity purchaser fails to provide a sales contract containing both the Next-to-Signature and Separate-Page Notices required under sections 1695.5[, subdivisions](a) and (b), the equity seller's *right to rescind* the contract survives and is not extinguished"], italics added.)

from taking an inconsistent position in the trial court that the agreement was not enforceable.[6]

"'"Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding."' [Citation.] The doctrine applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (the court adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of *ignorance*, fraud, or mistake. [Citation.]" (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 235, italics added.)

At the time the Howards obtained a dismissal of their bankruptcy petition, they were ignorant that the residential purchase agreement did not comply with HESCA. "'"The gravamen of judicial estoppel is . . . the intentional assertion of an inconsistent position that perverts the judicial machinery."'" (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 85.) The Howards could not have acted with the intent sufficient to trigger judicial estoppel when they did not know Nichols and Miller had failed to comply with the required statutes in the residential purchase agreement.

VI.

DAMAGES

A. *Statutory Basis for Damages Under HESCA and FCA*

Under HESCA, the equity seller may recover as damages the amount of lost equity in the property – the difference between the fair market value of the property as of the initial date of violation of the statute, and the amount the equity seller realized in the transaction. (*Boquilon v. Beckwith*, *supra*, 49 Cal.App.4th 1697, 1716-1719; *Segura*

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[6] The Howards argue Nichols and Miller cannot raise this argument for the first time on appeal. The issue of judicial estoppel was raised in Nichols and Miller's proposed statement of decision.

v. McBride (1992) 5 Cal.App.4th 1028, 1038-1041.) Damages for violation of the right to repurchase the property are measured as "the difference between the value of the property at the time of breach and the repurchase price, plus other actual damages according to proof." (*Segura v. McBride, supra,* 5 Cal.App.4th at p. 1039.)

The equity seller is not entitled to recover as damages the appreciation in the value of the property unless the equity seller can prove "he or she would have a colorable chance of holding onto the property in order to realize the appreciation." (*Segura v. McBride, supra,* 5 Cal.App.4th at p. 1039.)

The equity purchaser is entitled to credits for any expenses that would have been incurred without the violation of HESCA. (*Boquilon v. Beckwith, supra,* 49 Cal.App.4th at pp. 1717-1719.) The equity purchaser is entitled to a credit for the fair market rental value of the property during any period in which the equity seller lived in the property without paying rent, and for any costs to the equity purchaser associated with the refinancing of the property. (*Id.* at pp. 1718-1719.)

The equity seller may also be entitled to exemplary damages, which are discussed, *post*.

In *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 422, another panel of this court concluded actual damages under FCA would be the lost equity in the property – the same as one portion of the actual damages under HESCA. The court also held that a violation of section 2945.4 entitles the seller to recover as damages the compensation the foreclosure consultant received. (*Onofrio v. Rice, supra*, 55 Cal.App.4th at p. 423.) Finally, the appellate court held that a trial court must award exemplary damages in an amount at least three times the actual damages when it finds there has been a violation of section 2945.4. (*Onofrio v. Rice, supra,* 55 Cal.App.4th at p. 423.) (The court was not completely correct in this regard. Section 2945.6 permits an award of exemplary damages in an amount at least three times the actual damages for violations of section 2945.4, subdivisions (a)-(e) or (g).)

B. *The Matter Must Be Remanded for Recalculation of Damages, and Issuance of a New Statement of Decision and a New Judgment.*

The statement of decision calculated the Howards' actual damages of $36,927.38 as follows: "Encumbrance from the Argent refinance [$486,000];[7] [¶] Total benefits to Howards [$449,072.62]; [¶] Statutory penalty." This damage calculation does not comply with our analyses of the relevant statutes. We remand the matter to permit the trial court to issue a new statement of decision, correctly calculating damages, if any. To assist the trial court in doing so, we provide the following step-by-step procedure.

The first step in the calculation of any damages is based on the Howards' lost equity. (See *Segura v. McBride, supra,* 5 Cal.App.4th at p. 1038.) Nichols and Miller purchased the property from the Howards for $400,000, and made payments for the Howards' benefit totaling $381,770.42, as admitted by the Howards on the record. Additionally, the fair market value of the property as of the date it was purchased by Nichols and Miller was $415,000. At this stage, the total lost equity suffered by the Howards due to the purchase of the property by Nichols and Miller was $33,229.58.[8]

Were the Howards also entitled to damages from Nichols and Miller's violation of their right to repurchase the property by encumbering the property with the refinancing in December 2004 without the Howards' written consent? (§ 1695.6, subd. (e).) The option agreement provided that the Howards would have the right to repurchase the property for an amount "no less th[a]n current appraised value, and no more th[a]n market price at time option is exercised." However, there is no evidence the Howards had the financial ability to exercise that option at any of the relevant prices. Therefore, there is no need to calculate a difference between the value of the property at the time of the refinancing and any repurchase price. (See *Segura v. McBride, supra,* 5 Cal.App.4th at p. 1039.)

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[7] The Argent refinance was the December 2004 refinancing.

[8] $415,000 - $381,770.42 = $33,229.58

The trial court must also credit Nichols and Miller for the fair rental value of the property from June 2005 through entry of the original statement of decision,[9] as well as any other amounts that are properly credited or charged back to Nichols and Miller. (See *Boquilon v. Beckwith, supra,* 49 Cal.App.4th at pp. 1717-1719.)[10]

The trial court should also award prejudgment interest on the amount of any damages. (See *Segura v. McBride, supra,* 5 Cal.App.4th at pp. 1040-1041.)

For any violations of FCA, damages for lost equity in the property are identical to damages recoverable under HESCA, and cannot be recovered twice. If the trial court finds that Nichols and Miller violated any other provision of FCA, it shall specify what services were provided by Nichols and Miller (§ 2945.1, subd. (e)); what violation(s) of FCA occurred (§ 2945.4, subds. (a)-(h)); and what actual damages were suffered by the Howards as a result of those violations (§ 2945.6).

We fully recognize that after these calculations are completed, the Howards may not recover any damages at all. If so, this result is simply a reflection of the parties' agreement and the crediting of amounts for a "rent free" lease of the property.

C. *Constitutionality of Section 1695.7's Treble Damages Provision*

On appeal, Nichols and Miller argued the provision of section 1695.7 requiring the trial court to treble the equity seller's actual damages is unconstitutional on

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[9] In the statement of decision and the judgment, the trial court ordered the Howards to maintain the mortgage, homeowner association dues, and taxes until the property is either refinanced or sold. We presume the Howards did, in fact, make these payments. If they did not, and instead continued to live in the property rent and expense free, additional rent and other expenses may be due from the Howards to Nichols and Miller.

[10] The following evidence regarding possible credits and chargebacks appears in the record: From the original purchase of the property by Nichols and Miller, Nichols and Miller received a loan origination fee of $12,000, which they used to make mortgage, insurance, and tax payments, and to pay homeowners association dues. Miller also recouped the $350 appraisal fee he had paid. Finally, a payment was made to Nichols from escrow in the amount of $736.89. When Nichols refinanced the property, he and Miller received a total of $83,134.32, including a loan origination fee of $24,300.

its face and as applied to them. Section 1695.7 reads, in relevant part: "An equity seller may bring an action for the recovery of damages or other equitable relief against an equity purchaser for a violation of any subdivision of Section 1695.6 or Section 1695.13. The equity seller shall recover actual damages plus reasonable attorneys' fees and costs. In addition, the court may award exemplary damages or equitable relief, or both, if the court deems such award proper, but in any event *shall award exemplary damages in an amount not less than three times the equity seller's actual damages for any violation of paragraph (3) of subdivision (b) of Section 1695.6 or Section 1695.13*; or the court may award a civil penalty of up to two thousand five hundred dollars ($2,500), but it may not award both exemplary damages and a civil penalty." (Italics added.)

Nichols and Miller argue the statute requires a trial court to award exemplary damages, thus violating the separation of powers. A statute requiring automatic trebling of damages is not per se unconstitutional, although it more often occurs when the amount of actual damages is likely to be small, when the statute prohibits conduct that is "inherently antisocial," or when there is a finding of malicious or willful conduct. (*Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686, 691-692.)

Nichols and Miller also argue the treble damages awarded against them violate constitutional guarantees because the Howards failed to present evidence of (1) Nichols and Miller's financial ability to pay, or (2) malice, fraud, or oppression by Nichols and Miller, as required by section 3294. We conclude the treble damages available under section 1695.7 are statutory damages, not punitive damages, and are therefore not subject to section 3294.

In considering statutory damages under a different statute (section 37.9 of the San Francisco Rent Ordinance), the court in *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597-1598 stated: "The problem with appellant's argument is that it erroneously equates punitive damages with statutory damages, and assumes the two are awarded based on the same standards. [Citation.] Appellant correctly points out that the judge or jury, as the case may be, has the authority to decide whether and what amount of punitive damages should be awarded. [Citation.] In contrast, statutory damages are set by a legislative body; while the fact finder must still determine *whether* such damages are to be awarded, if they are granted the amount is fixed by statute. Statutory damages may either take the form of penalties, which impose damages in an arbitrary sum, regardless of actual damages suffered or, as in the instant case, may provide for the doubling or trebling of the actual damages as determined by the judge or jury. [Citation.] Thus, while both exemplary damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts, one of which is entrusted to the factfinder, the other to the Legislature. The numerous statutes specifically providing for treble damages testify to the fact that the Legislature never intended Civil Code sections 3294 and 3295 to restrict its ability to set the appropriate damage award in particular areas. [Citations.]"

Nichols and Miller rely on *Hale v. Morgan* (1978) 22 Cal.3d 388, which considered the constitutionality of a civil penalty imposed under former section 789.3; at that time, former section 789.3 read as follows: "'(a) A landlord shall not with intent to terminate the occupancy under any lease or other tenancy or estate at will, however created, of property used by a tenant as his residence willfully cause, directly or indirectly, the interruption or termination of any utility service furnished the tenant, including, but not limited to water, heat, light, electricity, gas, telephone, elevator, or refrigeration, whether or not the utility service is under the control of the landlord. [¶] (b) Any landlord who violates this section shall be liable to the tenant in a civil action for all of the following: [¶] (1) Actual damages of the tenant. [¶] (2) One hundred dollars ($100) for each day or part thereof the tenant is deprived of utility service. [¶] (c) In any action under subdivision (b), the court shall award reasonable attorney's fees to the prevailing party.'" (*Hale v. Morgan, supra*, 22 Cal.3d at p. 393.) A mobilehome park landlord had disconnected the water and electrical lines to the plaintiff's trailer. (*Ibid.*) The plaintiff nevertheless continued to live in the trailer for 173 days. (*Ibid.*) After a trial, the court found the landlord had violated former section 789.3, and imposed a $17,300 penalty. (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 393.)

The Supreme Court concluded former section 789.3 was not unconstitutional on its face, but resulted in unconstitutionally excessive penalties in the case at hand. (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 404.) "[O]peration of the penalty provided by section 789.3 is mandatory, mechanical, potentially limitless in its effect regardless of circumstance, and capable of serious abuse. Its severity appears to exceed that of sanctions imposed for other more serious civil violations in California and for similar prohibited acts in other jurisdictions. For all of the foregoing reasons in combination, we hold that section 789.3 may, under circumstances such as those herein presented, produce constitutionally excessive penalties. [¶] We cannot conclude, however, that all applications of section 789.3's penalty formula would be unconstitutional. The imposition of the $100 daily penalty over a limited period may indeed, in a given case, be a perfectly legitimate means of encouraging compliance with law. Furthermore, there are doubtless some situations in which very large punitive assessments are both proportioned to the landlord's misconduct and necessary to achieve the penalty's deterrent purposes." (*Ibid.*)

"In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute. [Citations.] [¶] It is equally well accepted that a state may impose reasonable penalties as a means of securing obedience to statutes validly enacted under the police power. 'There is no inhibition upon the state to impose such penalties for disregard of its police power as will insure prompt obedience to the requirements of such regulations.' [Citation.] Imposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy." (*Hale v. Morgan, supra,* 22 Cal.3d at p. 398.)

In considering the constitutionality of section 1695.7, we must bear in mind the following. First, we liberally construe HESCA to effectuate its stated intent and achieve its intended purposes. (§ 1695, subd. (d)(2).) One of the intended purposes of HESCA is "to preserve and protect home equities for the homeowners of this state." (§ 1695, subd. (d)(1).) Second, the automatic trebling of damages provision which Nichol and Miller challenge applies only in two circumstances:

(1) when the equity purchaser, before "the time within which the equity seller may cancel the transaction has fully elapsed . . . [¶] . . . [¶] . . . [t]ransfer[s] or encumber[s] or purport[s] to transfer or encumber any interest in the residence in foreclosure to any third party, provided no grant of any interest or encumbrance shall be defeated or affected as against a bona fide purchaser or encumbrancer for value and without notice of a violation of this chapter, and knowledge on the part of any such person or entity that the property was 'residential real property in foreclosure' shall not constitute notice of a violation of this chapter" (§ 1695.6, subd. (b)(3)); and

(2) when the equity purchaser has violated section 1695.13, which provides, "[i]t is unlawful for any person to initiate, enter into, negotiate, or consummate any transaction involving residential real property in foreclosure, as defined in Section 1695.1, if such person, by the terms of such transaction, takes unconscionable advantage of the property owner in foreclosure." (§ 1695.7.)

Given all the foregoing, we conclude section 1695.7 is not unconstitutional on its face.

However, we need not reach the issue whether section 1695.7 is unconstitutional as applied in this case. As discussed *ante*, the matter is remanded for recalculation of damages, and there is a very real possibility that the actual damages, if any, may be small. Until the actual damages are correctly calculated, we cannot determine whether trebling those damages would constitute a violation of Nichols and Miller's constitutional rights.

VII.

THE HOWARDS' CROSS-APPEAL

A. *The Motion to Dismiss the Cross-appeal as Untimely Is Denied.*

Nichols and Miller moved to dismiss the Howards' cross-appeal as untimely. Nichols and Miller cite California Rules of Court, rule 8.108(f)(1), which reads as follows: "If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal."[11] Nichols and Miller argue that the Howards' notice of cross-appeal, which was filed 28 days after the notice of appeal was filed, is untimely.

Nichols and Miller ignore California Rules of Court, rule 8.108(b)(1)(A) and (c)(1), which applies when a motion for a new trial or a motion to vacate the judgment is filed, and extends the time to appeal from the judgment *for all parties* until 30 days after the postjudgment motion is denied.[12]

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[11] In the motion to dismiss, Nichols and Miller cite California Rules of Court, former rule 8.108(e)(1). That rule was relettered effective January 1, 2008.

[12] California Rules of Court, rule 8.108(b)(1)(A) reads in relevant part: "If any party serves and files a valid notice of intention to move for a new trial, *the time to appeal from the judgment is extended for all parties as follows*: [¶] . . . If the motion is denied, until the earliest of: [¶] . . . 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order." (Italics added.) Rule 8.108(c)(1) reads in relevant part: "If, within the time prescribed by rule 8.104 to appeal from the judgment, any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, *the time to appeal from the judgment is extended for all parties* until the earliest of: [¶] . . . 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order." (Italics added.)

The trial court decided the motions for a new trial and to vacate the judgment on May 30, 2007. The Howards' notice of cross-appeal was filed June 29, 2007, within the time period provided by California Rules of Court, rule 8.108(b)(1)(A) and (c)(1). Rule 8.108(f)(1) cannot be used to shorten the time to appeal, only to extend it. As noted by one leading treatise: "The [California Rules of Court, rule] 8.108(f)(1) extension will never have the overall effect of shortening the otherwise applicable time for appeal: i.e., if the 20-day extended deadline *precedes* the applicable deadline under [rule] 8.104(a) or 8.108(b)-(e), the *longer* deadline governs." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 3:101, p. 3-41 (rev. #1, 2007).)

Nichols and Miller's motion to dismiss the cross-appeal is denied as meritless.

B. *There Was Substantial Evidence Supporting the Trial Court's Finding That Nichols and Miller Made No Misrepresentations.*

On appeal, the Howards challenge the following finding: "The Court cannot find misrepresentations made by plaintiffs, only a failure to follow the law." The Howards identify several statements in the flyer they received from Nichols and Miller and in the January 20, 2004 letter, which the Howards claim are untrue.

Only material misrepresentations are actionable. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481.) To be material, the misrepresentation must be such that the parties would not have entered into the contract without it. (*Chalas v. Andersen* (1961) 192 Cal.App.2d 452, 456.) The statements in the flyer and the January 20 letter were not material. They were marketing tools used to entice the Howards into negotiating with Nichols and Miller. At most, those statements were the type of general, vague, and unspecified assertions that constitute puffery; such assertions are not actionable, because no reasonable consumer could rely on them. (*Corbett v. Otts* (1962) 205 Cal.App.2d 78, 83; *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133, 1139.)

One of the statements of which the Howards complain is material – the statement in the January 20 letter that the Howards will "be given enough cash to pay off all your bills, fix your car, clear yourself from your second attempt at Bankruptcy." That statement was true, so it could not form the basis of a claim for fraud against Nichols and Miller.

The trial court's finding that the Howards had not proven an actionable fraud is supported by substantial evidence.

DISPOSITION

The judgment in favor of Nichols and Miller on the Howards' cross-claim for fraud is affirmed. In all other respects, the judgment is reversed. The matter is remanded to the trial court with directions to quiet title on the property in the name of Nichols and Miller, to recalculate damages, if any, owed by Nichols and Miller to the Howards, and to issue a new statement of decision and a new judgment consistent with this opinion. In the interests of justice, because both sides prevailed in part on appeal, neither side shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.